ANGUS E. PEYTON

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 98-4; 98-41 Decided April 8, 2003

Appeal from an order of Administrative Law Judge David Torbett granting costs and expenses, including attorney fees, pursuant to section 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1994). Hearings Division Docket IBLA 93-293.

Affirmed.

1. Attorney Fees: Surface Mining Control and Reclamation Act of 1977--Statutory Construction: Generally--Surface Mining Control and Reclamation Act of 1977: Attorney Fees/Costs and Expenses: Generally

   Under 43 CFR 4.1294(b), OSM may award appropriate costs and expenses, including attorney fees, to any person, other than a permittee or his representative, who initiates or participates in any proceeding under SMCRA, and who prevails in whole or in part, achieving at least some degree of success on the merits, upon a finding that such person made a substantial contribution to a full and fair determination of the issues. Under 43 CFR 4.1295, the award includes all costs, expenses, and attorney fees reasonably incurred as a result of initiating or participating in a proceeding under the Act, as well as those reasonably incurred in seeking the award.

2. Attorney Fees: Surface Mining Control and Reclamation Act of 1977--Statutory Construction: Generally--Surface

Mining Control and Reclamation Act of 1977: Attorney Fees/Costs and Expenses: Generally

Section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (2000), authorizes an award of "all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred" for or in connection with a person's participation in an administrative proceeding under the Act. In section 701 of SMCRA "permit applicant" or "applicant" and "permittee" are separately defined as "a person applying for a permit," and "person holding a permit," respectively. 30 U.S.C. § 1291(16) and (18) (2000). The definition of a "person" who may qualify for costs, expenses, and attorney fees under section 701(19) of SMCRA, 30 U.S.C. § 1275(e)(2000), includes non-permittees. Accordingly, a non-permittee seeking reversal of an Applicant Violator System link applied as a result of an alleged offending relationship with a violator coal company is a person who may properly petition for an award of costs and expenses, including attorney fees, under 43 CFR 4.1294(b).

3. Surface Mining Control and Reclamation Act of 1977: Attorney Fees/Costs and Expenses

Section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (2000), authorizes an award of "all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred" for or in connection with a person's participation in an administrative proceeding under the Act. A person seeking attorney fees is not required to record in great detail how each minute of time was expended, but the general subject matter of the expenditure should be identified. A good-faith petition for costs and expenses, including attorney fees, is one which excludes excessive, redundant, or unnecessary hours. The determination of an administrative law judge to grant a petition for costs and expenses, including attorney fees, will not be disturbed on appeal absent a showing of error or abuse of discretion.

APPEARANCES: Wayne A. Babcock, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation

and Enforcement; Thomas C. Means, Esq., and J. Michael Klise, Esq., Washington, D.C., for Angus E. Peyton.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

The Office of Surface Mining Reclamation and Enforcement (OSM or Appellant) has appealed an order dated August 11, 1997, by Administrative Law Judge David Torbett granting $38,159.50 in costs and expenses, including attorney fees, to Angus E. Peyton (Peyton or Appellee). Hearings Division Docket IBLA 93-293. 1/

The case underlying Peyton's petition for costs and expenses concerns Peyton's appeal (IBLA 93-293) from OSM's decision of March 10, 1993, reaffirming its earlier determination that Peyton "owned or controlled" Slab Fork Coal Company (Slab Fork) within the meaning of 30 CFR 773.5(b). By order dated April 17, 1993, this Board referred the case to the Hearings Division, Office of Hearing and Appeals. In an order dated August 8, 1994, Judge Torbett reversed "OSM's March 10, 1993 decision erroneously finding the Petitioner to be an owner or controller of Slab Fork Coal Co.," and dismissed the case. 2/

By way of background, we will set forth the material facts, which are undisputed by OSM, as presented by Peyton in his Statement of Reasons (SOR) filed with the Hearings Division on May 13, 1993: 3/

1/ This case was inadvertently docketed a second time as IBLA 98-41, which is hereby dismissed.

2/ The record reflects that OSM conceded that its control-link ruling in the March 10, 1993, decision was erroneous after deposing Peyton. In a March 23, 1994, letter from counsel for OSM to Judge Torbett, the ALJ was advised: "Based on the deposition of Mr. Peyton, OSM is now satisfied that he did not control Slab Fork Coal Co. Accordingly, the agency intends to draft a revised agency decision reflecting this determination and, correspondingly, amend the Applicant/Violator System files to reflect the same." Despite its assurance to Judge Torbett above that it would withdraw the March 10, 1993, decision, and correct it with a revised decision, OSM did not do so, and Judge Torbett, upon Peyton's motion, reversed the March 10, 1993, decision and dismissed the case in his August 8, 1994, order.

3/ Peyton appealed the final determination letter linking Peyton and Slab Fork through ownership and control to this Board pursuant to the appeal instructions included therein, which provided that "any person" who is or may be adversely affected by the decision may appeal to this Board in accordance with the provisions of 43 CFR 4.1280-4.1286. However, because individuals and corporate entities were

(continued.....)

1. Slab Fork Coal Company was incorporated in 1907 and operated profitably each year until 1977, when it began experiencing losses in the coal market. Interim Decision ("Dec.") (Mar. 10, 1993) at 2.

2. Since its inception, Slab Fork was operated and closely controlled by the Caperton family, whose members served as Chairman, President, and Chief Operating Officer. Dec. at 2.

3. Mr. Peyton was a minority stockholder in Slab Fork Coal Company. Dec. at 2. He personally owned 90 shares of common stock, which he acquired through inheritance. Affidavit of Angus E. Peyton ("Peyton Aff.") (Mar. 20, 1992) para. 1; Supplemental Affidavit of Angus E. Peyton ("Peyton Supp. Aff.") (May 12, 1993) para. 1 * * *.) He was also one of three co-trustees of a trust of which he was the primary beneficiary, which held 1,059 shares, for a total of 1,149 shares, or approximately 1.2 % of the outstanding stock of Slab Fork. Peyton Aff. Para. 1. Dec. at 4.

4. Mr. Peyton served as one of eleven directors of Slab Fork from 1967 until September 15, 1983. Dec. at 2.

5. Mr. Peyton did not otherwise serve as an officer or employee of Slab Fork except for his service as director. Dec. at 2. He did not receive any remuneration for his services except for fees for attending meetings, and received no other remuneration from Slab Fork except dividends on his minority stockholder's interest, which were paid in the normal course of business. Peyton Aff. para. 4.

6. In 1983, Slab Fork was forced into Chapter 7 bankruptcy by its creditors; it was subsequently converted into a Chapter 11 reorganization to continue to operate for the benefit of creditors. Dec. at 2.

3/ (.....continued)
afforded differing appeal rights in accordance with the preamble to the Department's regulations at 30 CFR Part 773 (53 FR 38879 (Oct. 3, 1988), the Board concluded that Peyton's appeal should be referred to the Hearings Division for handling in accordance with the authority then vested in the Board under 43 CFR 4.1286. Accordingly, Peyton's appeal, which was filed with the Board in accordance with OSM's final determination letter, was referred to the Hearings Division by the Board's order dated Apr. 27, 1993.

7. Mr Peyton resigned as a director of Slab Fork on September 15, 1983. Dec. at 3. At that time, he and several other individuals were forming a new company -- VenBlack, Inc. -- to bid on certain assets of Slab Fork. Mr. Peyton resigned the Slab Fork directorship to avoid any possible conflict of interest that his dual capacity might pose. Letter from Angus E. Peyton to Alzira Pickens (OSM) (Mar. 23, 1992) at 4; Peyton Aff. para 3; Letter from Angus E. Peyton to Gaston Caperton, Jr. (Sept. 15, 1983)(attached to Peyton Aff.).

8. VenBlack was incorporated on September 28, 1983, and subsequently purchased the Austin Black Division of Slab Fork and assumed the mining permit associated with the Slab Fork No. 2 Preparation Plant and the Austin Black Plant. Dec. at 3.

9. Although Mr. Peyton, as a director of Slab Fork, was generally aware of the Company's financial condition, plans, and goals, he had no knowledge of its day-to-day operations, and no authority to manage or control its operations or assets. Peyton Letter to Pickens at 3; Peyton Aff. paras. 5, 6); Peyton Supp. Aff. para. 3; Affidavit of Eugene Lusk (Mar. 20, 1992) paras. 3, 4; Affidavit of S. Austin Caperton, III (Mar. 17, 1992) paras. 3, 4; Affidavit of Dwight E. Trent (Mar. 19, 1992) paras. 3-4.

10. The directors of Slab Fork were generally not advised of notices of violation issued, or specific fines or penalties imposed, for alleged violations of the surface mining laws or regulations. If the Board of Directors was informed of these matters at all, it was when reviewing lump-sum items on financial statements when the directors met three or four times a year. Peyton Supp. Aff. para. 3.

11. When Mr. Peyton resigned from the Board of Directors of Slab Fork, he understood that the company had bank letters of credit totalling over $925,000 which had been issued as guarantees for reclamation bonds and workmen's compensation bonds for the state of West Virginia. Therefore, he had no reason or occasion to doubt that the company and the state of West Virginia had estimated the reclamation costs sufficiently to cover the needs of Slab Fork's operations, or that the company's assets in bankruptcy would be sufficient to meet the reclamation costs. Peyton Aff. para. 7. [Footnote omitted.]

(Statement of Reasons (SOR) at 2-5.)

In response, OSM observed that Peyton "was listed on OSM's Applicant/ Violator System (AVS) as a presumed owner or controller of an entity with outstanding violations of the surface mining regulatory laws." (OSM's Response to Peyton's SOR at 1.) OSM determined that the information which Peyton had originally submitted to OSM on March 23, 1992, "was inadequate to rebut the presumption that he controlled Slab Fork prior" to the termination of his relationship with Slab Fork on September 15, 1983. Id. However, OSM admitted that "the violations listed in the AVS, for which Slab Fork was responsible, post-dated Peyton's severance of his relationship with Slab Fork; thus, Peyton was not linked to any outstanding violations of Slab Fork, pending any further development of the facts surrounding Slab Fork's operations." Id. at 1-2 (emphasis added.) OSM's position at the time was based upon its narrow reading of 30 CFR 773.5(b)(1) (1992), which provided generally that being a director of an entity creates a presumption of ownership or control unless the person subject to the presumption could demonstrate that he did not, in fact, have the authority, directly or indirectly, to determine the manner in which the subject entity conducts its surface coal mining operations. OSM, even with the record supplemented by the SOR, concluded that Peyton "failed to present 'any specific evidence of the internal workings of Slab Fork which would demonstrate his exclusion from Slab Fork's decision-making process.'" (OSM Response at 8.)

In his Reply Brief, Peyton responded to OSM's position that he had failed to provide evidence of the internal workings of Slab Fork by reiterating as follows:

> [T]he Board of Directors did not become involved in, or have knowledge of, the manner in which the company conducted its surface coal mining operations from day to day. Those matters were handled by the Caperton family, whose members operated and closely controlled the company's operations since its inception and served as President, Chairman, and Chief Operating Officer throughout the period of [his] association with the company. In particular, the Board was not specifically informed of penalties, fines, or notices of violation in connection with the surface mining laws, as they were reported (if at all) only as lump-sum items on general financial reports that were presented at the Board's meetings. [May 12, 1983, Peyton Aff. para. 3.]
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> [I]ts Board were passive directors. Decisions were often made prior to [their] meetings and [they] were asked to ratify such actions at subsequent Board meeings. (July 8, 1993 Peyton Aff.)

(Peyton's Reply Brief at 5.)

On May 13, 1993, when Peyton filed his SOR, he also filed a "Motion for Summary Decision," stating that "[t]he uncontroverted evidence demonstrates, contrary to the determination below, that Mr. Peyton did not 'own' or 'control' Slab Fork Coal Company within the meaning" of § 510(c) of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1260(c), and OSM's regulations at 30 CFR § 773.5(b). (Motion for Summary Decision at 1.) During a conference call with counsel for the parties on September 14, 1993, Judge Torbett indicated that he would defer ruling on Peyton's motion for summary decision until OSM had an opportunity to take Peyton's deposition, which was taken on October 13, 1993. On March 23, 1994, OSM filed the following statement with Judge Torbett:

> Based on the deposition of Mr. Peyton, OSM is now satisfied that he did not control Slab Fork Coal Co. Accordingly, the agency intends to draft a revised agency decision reflecting this determination and, correspondingly, amend the Applicant/Violator System files to reflect the same. Upon receipt of the revised agency decision, presumably Mr. Peyton would then move to dismiss the present proceedings.

By order dated August 8, 1994, Judge Torbett acknowledged OSM's March 23, 1994, letter, and noted that "[n]o further action has been taken by OSM regarding this matter," and that Peyton had "moved for a summary dismissal of this case." Judge Torbett reversed and dismissed Peyton's appeal from OSM's March 10, 1993, decision, which he concluded had "erroneously [found Peyton] to be an owner or controller of Slab Fork."

On September 30, 1994, Peyton filed with Judge Torbett his "Petition for Award of Costs and Expenses, Including Attorney's Fees." After extensive briefing by OSM and Peyton, by order dated August 11, 1997, Judge Torbett ruled that "Peyton readily satisfies the conditions set forth in 43 C.F.R. § 4.1294(b) for an award of costs and expenses." (August 11, 1997, Order at 4-5.)4/ In the August 11, 1997, order, from which OSM has appealed, Judge Torbett stated in pertinent part:

> Peyton seeks reimbursement from OSM, pursuant to 43 C.F.R. § 4.1290 *et seq*., for the costs and expenses, including attorneys' fees, he incurred in this proceeding. 43 CFR 4.1294(b) provides that such costs and expenses may be awarded:

4/ The arguments presented by OSM and Peyton before Judge Torbett are reflected in the subsequent briefs submitted to this Board, so rather than summarize them here, we will advert to them as appropriate elsewhere in this opinion.

> From OSM to any person, other than a permittee or his representative, who initiates or participates in any proceeding under the Act, and who prevails in whole or in part, achieving at least some degree of success on the merits, upon a finding that such person made a substantial contribution to a full and fair determination of the issues.

(Emphasis added.) Under 43 C.F.R. § 4.1295, such an amount includes all costs, expenses, and attorneys' fees, reasonably incurred as a result of initiating or participating in a proceeding under the Act, as well as those reasonably incurred in seeking the award.

> OSM has vigorously opposed Peyton's petition. Not only did OSM file an Answer to Peyton's Petition for Award of Fees and Expenses opposing it, but it also subsequently filed a Response in Opposition to Petition for Award of Fees and Expenses, and yet a Further Response in Opposition to Petition for Fees and Expenses. OSM's objections are rejected. For the reasons stated in my decision in Skyline Coal Co., Docket No. NX 93-E-PR (August 1, 1994), appeal pending, [see Skyline Coal Co. v. OSM, 150 IBLA 51 (1999)], and in the Petition, in Appellant's Reply in Support of Petition, and in Appellant's Further Reply in support of Petition, I find that Peyton readily satisfies the conditions set forth in 43 C.F.R. 4.1294(b) for an award of costs and expenses. I further find that an award of $26,185.05 for the costs and expenses of Peyton's participation in the underlying litigation and an additional $11,974.45 for the costs and expenses of seeking this award are reasonable and appropriate and should be ordered pursuant to 43 C.F.R. § 4.1295.

(Aug. 11, 1997, Order at 4-5.)

In its SOR, filed with the Board, for appealing Judge Torbett's August 11, 1997, order granting Peyton's request for costs and expenses, including attorney fees, OSM contends that there was no intention on the part of Congress in enacting the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act), 30 U.S.C. § 1201, et seq. (2000), to apply the provisions of section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (2000), concerning the award of costs and expenses to an industry representative challenging an OSM determination. (SOR at 5.) OSM claims that while this may be the type of adversarial proceeding where the award of fees is authorized, "the petitioner here is not a member of the class of persons Congress intended to benefit with the fees shifting provision, at least absent extraordinary circumstances not present in this case." Id. at 6. OSM further contends that the

Senate Report relevant to the applicable provisions of SMCRA made clear that Peyton was not among those for whom attorney fee awards were to be available. According to OSM, the issue of "first impression" presented in this case "is whether a former representative of a mining company * * * opposing the potential for enforcement actions against himself * * * is a member of the group Congress intended to encourage to participate in enforcement of the Act by subsidizing their attorneys' fees through fees shifting, or is he a representative of the industry intended to pay his own costs and expenses." (SOR at 1.) OSM places heavy reliance upon the following paragraph from the Senate bill, which addresses the issue of citizen participation, in arguing that Peyton is ineligible for costs and expenses, including attorney fees:

> In many, if not most, cases in both the administrative and judicial forum, the citizen who sues to enforce the law, or participates in administrative proceedings to enforce the law, will have little or no money with which to hire a lawyer. If private citizens are to be able to assert the rights granted them by this bill, and if those who violate this bill's requirements are not to proceed with impunity, then citizens must have the opportunity to recover the attorneys' fees necessary to vindicate their rights. Attorneys' fees may be awarded to the permittee or government when the suit or participation is brought in bad faith.

(SOR at 8-9, quoting S. Rep. No. 128, 95th Cong., 1st Sess. at 59 (1977)). Referring to this paragraph as "the clearest expression of congressional" intent regarding the provisions for attorneys' fees in SMCRA, OSM reasons:

> Although the term used, "citizen," is broad, the context indicates a distinction between the citizens living in the coal fields and persons engaged in the regulated community. The Senate report distinguishes the "private citizens" with which Congress was concerned in providing for fees shifting from "those who violate the bill's requirements." Thus, the concern was not for every citizen. The language indicates that the regulated community was recognized as a separate group. The report further specifies that the provision of attorneys' fees was intended to encourage public participation in enforcement of the act. The statement emphasizes that the provision was meant to aid citizens asserting the rights protected by the Act and preventing violations of the Act by the regulated community.

(SOR at 9.) As a related matter, OSM contends that the Senate Report indicates that the Act does not provide for costs and expenses for members of the mining industry,

except where an enforcement action is brought by OSM in bad faith. Id. at 12, citing 43 CFR § 4.1294(c). 5/

OSM disputes Peyton's claim that he "brought the underlying action as an individual and not as a representative of a permittee." (SOR at 13.) OSM supports its argument with reference to the fact that the "whole focus of the AVS investigation of Peyton was his relationship with a defunct permittee and whether that past representation affects any future relationships in the coal mining industry." Id. Moreover, according to OSM, Peyton was "the subject of an enforcement decision made by OSM and the litigation he initiated was opposing the potential for an enforcement action against himself and those he is currently associated with in the industry." Id. OSM concludes, on this issue, that "in the context of an AVS determination, the logical construction is that Peyton is a 'representative of a permittee' precluded from entitlement to costs and expenses under 30 C.F.R. § 1294(b)." Id.

OSM next asserts that Peyton was not entitled to an award of costs and expenses for much of the legal work claimed because

> the bulk of the work performed on Peyton's behalf in this case was neither successful nor sufficiently related to any successful claim to justify the award of costs and expenses. At a minimum, the summary judgment proceedings were unsuccessful and unnecessary, and should be found uncompensable. The actual extent of the unnecessary hours expended on this matter, however, is impossible to determine from Peyton's submission, since it failed to adequately document the time spent on any particular task.

Id. at 16-17.

OSM's fourth contention urges that Peyton's Petition for Fees and Expenses is inadequate since it fails to properly document the time spent on the services rendered and applies an inappropriate hourly rate. Id. at 17. With respect to the authorized hourly rate under the Act, OSM claims that Peyton's petition for costs and expenses is deficient because it fails to establish the customary commercial rate in the location where the services were rendered, which OSM states should have been considered to be Charleston, West Virginia, and not Washington, D.C. Id. In making this claim, OSM states that the only exception to this rule is where the litigation necessitates a

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5/ The provision for attorney fees under SMCRA first appeared in the 1997 House of Representatives bill, H.R. 2, which ultimately became SMCRA. H.R. 2 contains no reference to attorney fees in administrative proceedings. See H.R. Rep. No. 95-218, 95th Cong., 1st Sess. at 88-89 (1977).

specialized expertise unavailable in the area of the litigation, an exception it claims to be inapplicable in the present case. Id. at 18, citing Natural Resources Defense Council v. OSM, 107 IBLA 339, 399 (1989). Thus, OSM asserts, application of the hourly rates charged in Washington, D.C., for the present litigation was inappropriate. Id.

Finally, OSM contends that Peyton's petition fails to present the time expended on the litigation by his attorneys in a manner in which the reasonableness of the time can be verified. Id. at 19. OSM states that the petition provides statements of work done on a daily basis, but provides only gross monthly accumulations of the hours expended for the services provided, making it impossible to determine whether time was written off or whether the time spent on a task was reasonable. The contemporaneous daily time sheets Peyton's attorneys reference, and presumably would permit the necessary review, were not provided. Id.

As an initial matter, in his answer to OSM's SOR, Peyton indicates his concurrence with the underlying facts as set forth in OSM's brief, except for what he characterizes as the "false allegations" that Peyton had failed to provide any details as to the individuals who allegedly controlled Slab Fork, or the mechanism of the alleged control, and that Peyton continued to avoid detailing the inner workings of Slab Fork's operations. (Answer at 1.) Peyton states that OSM's arguments must be rejected for several reasons, urging that the unambiguous language of SMCRA must control and that this language states that a cost award can be made in accordance with section 525(e) of SMCRA, 30 U.S.C. § 1275(e)(2000), which provides:

> Whenever an order is issued under this section, or as a result of any administrative proceeding under this Act, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings * * * may be assessed against either party as * * * the Secretary * * * deems proper.

(Emphasis added.) Peyton claims that section 525(e) of SMCRA "easily encompasses Peyton, who initiated the underlying administrative proceeding and prevailed in it," noting that "OSM did not appeal that decision." (Answer at 2 and n.1)

Peyton points out that OSM acknowledges that "[t]his case involves an adversarial type of enforcement proceeding that, based on [Utah International, Inc. v. U.S. Dep't of the Interior, 643 F. Supp. 810-17 (D. Utah 1986], and prior precedent of this Board, arguably is the type of proceeding encompassed by SMCRA § 525(e) * * * [and] this may be the type of proceeding where fees shifting is authorized."

(Answer at 2, quoting OSM's SOR at 6.) However, as noted, OSM proceeds to argue that Judge Torbett's decision authorizing attorney fees should be "overturned because Peyton 'is not a member of the class of persons Congress intended to benefit with the fees shifting provision, at least absent extraordinary circumstances not presented here.'" (Answer at 3.)

Noting that the Supreme Court has expressed its conclusions with regard to the breadth of the term "any person" appearing in a statute in Bennett v. Spear, 117 S.Ct. 1154, 1162 (1997), section 525(e) of SMCRA, Peyton claims, clearly extends to Peyton. Of equal concern, Peyton argues, is OSM's resort to ambiguous portions of the legislative history in an effort to "create" statutory ambiguity where none exists. Quoting from Independent Tanker Owners Comm. v. Skinner, 884 F.2d 587, 596 (D.C. Cir. 1989), Peyton notes that the D.C. Circuit Court stated, "[t]here being no ambiguity to resolve, an appeal to legislative history is inappropriate." Id., citing also Southern Pacific Pipe Lines, Inc. v. U.S. Dep't of Transp., 796 F.2d 539, 542 (D.C. Cir. 1986). Peyton further observes that the Supreme Court has also stated that "it is the statute, and not the Committee Report, which is the authoritative expression of the law, and the statute prominently omits reference to [the language from the legislative history relied on by its proponent]." Chicago v. Environmental Defense Fund, 114 S.Ct. 1588, 1593 (1994). (Answer at 4-5.) Thus, Peyton argues, the plain language of section 525(e) of SMCRA is controlling. (Answer at 5.)

According to Peyton, even if resort to the legislative history were appropriate, the legislative history from the Senate bill cited by OSM relates not to section 525(e), which is derived from the House bill, but rather relates to the intent of SMCRA's citizen suit authorization under section 520(a) of SMCRA, 30 U.S.C. § 1270(a) (2000). Peyton recites the identical language from the House and Senate Conference Reports, which states: "[T]he House bill allows the Secretary to award costs in an administrative proceeding. The Senate amendment contained no similar provision. The conferees adopted a version of the House provision * * *." (Answer at 5, quoting H.R. Conf. Rep. 95-493 at 111 (1977); Sen. Conf. Rep. 95-337 at 111 (1977).) More importantly, Peyton claims, "despite OSM's assertion that the Senate Report on the citizen suit provision of the Senate bill mentioned the problems of citizens lacking the resources to hire a lawyer to press their claims 'in both the administrative and judicial forum,' that discussion is not part of the legislative history of § 525(e)." (Answer at 5.) For this reason, Petyon states, OSM's "misplaced reliance on that legislative history must be rejected." Id.

As a related matter, Peyton asserts that OSM's reliance on the legislative history of section 520(a) of SMCRA, 30 U.S.C. § 1270(a) (2000), rather than the appropriate section 525(e), likewise misconstrues Congress's intent to make costs and expenses available to "any person" under section 525(e), rather than the limitation noted by OSM to "citizen complainants" under section 520(a). (Answer at

5-6.) 6/ Furthermore, Peyton contends that the plain language of section 525(e) is supported by the implementing regulation at 43 CFR 4.1294(b), consistent with the statute, which authorizes an award "[f]rom OSM to any person, other than a permittee or his representative, who initiates or participates in any proceeding under the Act." (Answer at 8, quoting regulation.) Moreover, Peyton states, "it seems beyond question that ensuring that SMCRA is properly and fairly enforced enhances the legitimacy and credibility of the entire regulatory scheme, thus encouraging respect for and voluntary compliance with the Act, enhancing its efficacy far more than unbridled, over-zealous enforcement actions ever could." Id.

Peyton refers to OSM's "mistaken reliance on the Senate Report's legislative history despite the fact that § 525(e) came from the House bill" as a "fundamental error in OSM's review of the legislative history." (Answer at 7.) Peyton emphasizes that the House Report addressed section 525(e) in a "separate section that contemplated awards to 'participants' in administrative proceedings, not just to a narrow class of 'citizens' who advocate aggressive enforcement against the industry."
(Answer at 7.) That separate section provides:

> Section 525(e) provides for the award of costs, including attorneys' and expert witness fees, in the discretion of the Secretary. The section gives the Secretary authority to award attorneys' fees to compensate participants in the administrative process. The subsection does not require that the proceedings result in a finding of a violation nor does the fact that the Government was a party in an adjudicatory proceeding, or had caused the proceeding to be initiated prevent an award under the terms of the subsection. It is the committee's intention that this subsection not be interpreted or applied in a manner that would discourage good faith actions on the part of interested citizens.

6/ Peyton states, however, that OSM is also wrong in asserting that he is not a citizen as described in the Senate Report. He explains that the Senate Report envisioned citizen involvement in all phases of the regulatory scheme, not just in one or another narrow segment. Peyton argues that he, no less than others in whose fee applications OSM apparently would acquiesce, is capable of ensuring OSM's compliance with the Act and has brought a good faith action to ensure that the Act is being enforced just as the Senate Report contemplates. Indeed, Peyton states, the beneficial impact on enforcement which OSM claims is lacking is, in fact, at its zenith in this case: by overturning OSM's erroneous and invalid determination that Peyton "owned or controlled" Slab Fork, Peyton has helped insure OSM's compliance with section 510(c) of the Act and with its own regulations, thus lending legitimacy and integrity to the administrative enforcement process. (Answer at 6-7, n.4.)

(H.R. Rep. No. 95-218, at 131 (emphasis added), quoted at Answer at 7.)

Peyton next responds to OSM's contention that he is a "representative" of a permittee, and thus not eligible for a cost award under 43 CFR § 4.1294(b). See SOR at 13. Peyton, citing Webster's New College Dictionary (Webster's) (1979 ed.), states that a representative is "one that represents another as agent, deputy, substitute, or delegate [usually] being invested with the authority of the principal." (Answer at 10, quoting from Webster's at 974.)7/ Peyton explains that there is no evidence he was ever Slab Fork's representative, and that this was at the heart of the underlying proceeding where he proved he did not own or control Slab Fork, or have anything to do with the way it conducted its mining operations. Id. He emphasizes that "OSM's sole basis for this claim is that Peyton had been an outside director of Slab Fork Coal Company (itself a permittee at the time) until 1983 and that it was this past association with Slab Fork which was the basis for the listing on the AVS which Peyton had challenged as erroneous in the administrative proceeding in question." Id. Peyton argues that "[h]e was merely one member of a 12-member board of directors of a company that was closely-held by a family group of which he was not a part, with no authority to represent the company." Id. Equally significant, Peyton claims, in his appeal of the March 1993 OSM decision, he "sought to advance no interest or objective of Slab Fork's, but rather his own interest as a lawyer, former public servant, and businessman who sought to correct the mistaken information in the AVS that had embarrassed him and damaged his reputation." Id. at 10-11. Moreover, he relates that he had disassociated himself from Slab Fork in 1983. Id. at 11.

Peyton next responds to OSM's claim that he is not entitled to an award because the "[l]itigation was not necessary to accomplish [his objective, and therefore] * * * had no merit." (SOR at 15-16.) Peyton urges that OSM's argument that Peyton had simply "failed to provide OSM with sufficient information regarding the inner workings of Slab Fork's management to allow the agency to determine that Peyton did not control the company" is simply not true." (Answer at 11.) Peyton states that he provided OSM with a great deal of information concerning the inner workings of Slab Fork's management, including not only his own affidavit, but also the sworn affidavits of Slab Fork's former President, its former Secretary-Treasurer, and its former Vice President of Mining Services. Id. Peyton further states that each of these officials attested to his lack of authority over the manner in which Slab Fork

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7/ Black's Law Dictionary 1304 (7th ed. 1999) defines "representative" as "one who stands for or acts on behalf of another," e.g., "the owner was the football team's representative at the labor negotiations." Also, acting in a "representative capacity" refers to the "position of one standing or acting for another, especially through delegated authority." Id.

conducted its surface coal mining operations and the fact that it was the corporate officers and shareholders who held all control. Id. at 11-12.

Peyton contends that OSM's argument that the litigation was unnecessary also fails because in his March 23, 1992, letter and submission to OSM, he had requested the opportunity to provide additional information if the submission was inadequate or if any questions remained unanswered. He had stated:

> In the event that you or your staff have any questions and would like additional information, please contact me at your convenience. In fact, I would like the opportunity to submit additional evidence, if necessary, before this request is ruled upon as insufficient or incomplete. Finally, I would also be glad to discuss the matter with you in person if that would prove to be beneficial.

(Answer at 13, quoting Peyton's March 23, 1992, letter at 8.) No request by OSM was ever made. More importantly, Peyton argues, OSM has failed to identify, nor can it identify, any services for which he seeks recovery that are unrelated to demonstrating that OSM's conclusion that he "controlled" Slab Fork was erroneous. Id. at 14 (footnote omitted.) In fact, Peyton points out, the litigation before OHA, including the motion for summary decision, rather than being unsuccessful, persuaded OSM either that it had misjudged his case or that it could not sustain its decision on the merits before Judge Torbett. Id. at 15.

In that regard, Peyton explains that after briefing the Motion for Summary Decision, OSM's attorney requested that Judge Torbett delay ruling on the motion until OSM had deposed Peyton, indicating that "dependent on the outcome of the deposition," "the Department was going to take a position as to whether this case needed a hearing or could be decided on the basis of the record." Id.; see Att. C to Answer at 1. The deposition was taken on October 13, 1993. When Judge Torbett heard nothing, he requested, on March 1, 1994, that the parties respond concerning the status of the case. Id. OSM then responded on March 23, 1994, that the deposition had "satisfied [OSM]" that Peyton did not control Slab Fork, and that OSM "intends to draft a revised agency decision reflecting this determination and, correspondingly, amend the [AVS] files to reflect the same." (Att D. to Answer.) On July 6, 1994, when no revised agency decision was reasonably forthcoming, Peyton requested that Judge Torbett enter summary decision on his behalf, reversing OSM's March 10, 1993, decision and declaring that, as now admitted by OSM, Peyton did not own or control Slab Fork. (Answer at 16.) On August 8, 1994, Judge Torbett granted Peyton's motion, reversing OSM's March 10, 1993, decision, and dismissing the case. Id. In view of this record, Peyton asserts that OSM's objection that the litigation was unnecessary is without merit. Peyton emphasizes that it took the summary decision motion to get OSM to finally review the case fairly, which resulted

in the favorable ruling by Judge Torbett on the Motion for Summary Decision to finally dispose of the case. Id.

In response to OSM's claim that Peyton's Petition applied inappropriate hourly rates and inadequately documented time spent, Peyton asserts that OSM is wrong on both counts. Peyton states that OSM relies solely on Natural Resources Defense Council, Inc. v. OSM (NRDC), 107 IBLA 339, 369-71 (1989), in arguing that the hourly rate claim, based on Washington, D.C., rates, is too high because it violates the rule that the "relevant community for determining the reasonable hourly rate for a petition for costs and expenses is generally where the subject hearing takes place." (Answer at 17, quoting SOR at 17-18.) According to OSM, the hearing, if held, would have been held in Charleston, West Virginia, because that is the location of Peyton and the mining operation in question. Id. Peyton urges that the Board consider, however, that in NRDC, cited by OSM, the rate applied was likewise the Washington, D.C., rate, although the case was tried in Colorado. Similarly, Peyton cites factors which make it far from clear where a hearing would have occurred in this case. He states:

> This case involved: an appellant located in Charleston, West Virginia, who from the outset offered to come to Washington, D.C. to meet with agency officials to discuss the issues; a judge located in Knoxville, Tennessee (now in St. Paul, Minnesota); an enforcement agency located in Washington, D.C.; an adjudicative agency located in Arlington, Virginia; agency counsel located in Pittsburgh, Pennsylvania; and appellant's counsel located in Washington, D.C.

(Answer at 17.) Peyton states that in NRDC the Washington, D.C., rate of petitioner's counsel was applied because the "case involved the interpretation of SMCRA and its implementing regulations," and because "[a]t the time of filing of the petition for review and during subsequent proceedings, no significant body of case law existed regarding SMCRA and little or none regarding the permitting process." NRDC, 107 IBLA at 398, quoted in Answer at 18. Thus, the petitioners in NRDC claimed that "necessity for specialized expertise was absolutely essential." Id. Peyton further states that the heart of the underlying case, just as in NRDC, concerns the highly complex and controversial section 510(c) of SMCRA, and OSM's regulations implementing it. (Answer at 18.) In his Answer, Peyton explains the complexity of the "owns or controls" language within that section:

> The pivotal regulatory definition of "owns or controls," which lay at the heart of the merits phase of this litigation, required 22 pages of Federal Register preamble to explicate when OSM promulgated it in 1988. 53 Fed. Reg. 38868-90 (1988). It is a complicated definition and can be difficult to apply, as both OSM and the courts have recognized. For

example, in the first decision by a court of appeals addressing the definition, the Eighth Circuit found:

> OSM has created no specific standards to guide [permit] applicants in applying the more general ownership and control provision when one person has authority directly or indirectly to determine the manner in which the mining operation is conducted [30 C.F.R. § 773.5(b).] As the instant case illustrates, determination of ownership and control is often unclear, and [the operator] now runs the risk of submitting incomplete permit applications if it does not invest sufficient effort in investigating [the alleged] ownership and control links, or if it makes an incorrect judgment whether an ownership or control link exists.

Coteau Properties Co. v. Department of Interior, 53 F.3d 1466, 1480 (8th Cir. 1995).

Id.

With respect to his legal requirements during the fee petition phase of these proceedings, Peyton asserts that the need for expert counsel was heightened because, as OSM stated in its SOR at 1, this litigation raised an issue of first impression under section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (2000). Id. at 20. Noting the very extensive briefing conducted by OSM in this case with the full resources and expertise of the Office of the Solicitor at its disposal, Peyton argues the need for similar expertise in light of OSM's aggressive opposition to his valid petition. Id. He states that

> OSM went to extraordinary lengths to oppose the award to Peyton and to have the last word, filing not only a 16-page Answer, but also a 7-page "Response" and a 3-page "Further Response" with the ALJ. OSM's relentless briefing mirrors its aggressive approach to AVS issues in other instances -- both litigation and rulemaking. See, e.g., James Spur, Inc., IBLA No. 96-633(ALJ Torbett July 23, 1993), aff'd as modified, 133 IBLA 123 (July 26, 1995), OSM's motion for stay denied, No. D 95-184 (Oct. 25, 1995), aff'd by Director, OHA, 12 OHA 133 (Apr. 5, 1996, overruled as precedent, Solicitor's M-Opinion (Dec. 5, 1996); see also 62 Fed. Reg. 19450-61 (Apr. 21, 1997) (summarily repromulgating, without public notice or opportunity to comment, regulations that the D.C. Circuit had just invalidated, and making

> them effective retroactively to a date prior to the date on which the D.C. Circuit's mandate issued).

Id. at n.10. Because of the aggressive approach adopted by OSM and the complexity and uncertain state of the law surrounding section 510(c) of SMCRA, Peyton claims he sought counsel with specialized expertise, "just as the appellants had done in NRDC." Id. at 21. 8/

Finally, in response to OSM's claim that his counsel failed to document fees adequately, Peyton notes that the lead counsel (Means) prepared an affidavit for Judge Torbett which presented a monthly breakdown of hours spent by each attorney, and a daily breakdown of work performed, compiled from contempora- neous time records. Id. at 22, citing Means Aff. at Att. A-1 to Petition. In a supplemental affidavit submitted to Judge Torbett on August 7, 1997, Peyton's attorneys documented on a daily basis the subsequent time spent and the rates charged in preparing his fee petition and defending it against the three responses OSM filed with Judge Torbett. Id., citing Means Aug. 7, 1997, Supp. Aff. Peyton urges that the actual bills, included with the Petition, spell out attorney billing rates, time, fees, and services, based on contemporaneous records, meet the criteria that the application be "sufficiently detailed to permit * * * an independent determination whether or not the hours claimed are justified." Id. at 23, quoting National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1327-28 (D.C. Cir. 1982); citing also Action on Smoking and Health v. Civil Aeronautics Board, 724 F.2d 211, 220 (D.C. Cir. 1984); and Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980). Noting that OSM has not identified any specific aspect of his billing that it considers unreasonable, Peyton states that the bills exclude hours that were "even

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8/ Appellee recites that Appellee's counsel Thomas C. Means, Esq., and J. Michael Klise, Esq., have written and lectured on SMCRA and the AVS and have served as lead counsel for national mining industry trade associations and individual mining companies in the nationwide SMCRA rulemaking litigation, citing, e.g., National Wildlife Federation v. Lujan, 950 F.2d 765 (D.C. Cir. 1991); National Wildlife Federation v. Hodel, 853 F.2d 694 (D.C. Cir. 1988); In re Surface Mining Regulation Litigation, 627 F.2d 1346 (D.C. Cir. 1980). (Answer at 21; see Petition, Exs. 2-5 of Attach. A to Answer.) Peyton states that of particular relevance is that these counsel were the lead attorneys for the trade associations as intervenors in the citizen suit that gave rise to the AVS (Save Our Cumberland Mountains, Inc. v. Lujan, 963 F.2d 765 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1257 (1993)), and as counsel in the litigation that successfully challenged the ownership and control regulations at the heart of Appellee's case (National Mining Ass'n v. U.S. Dep't of the Interior, 105 F.3d 691 (1997)). (Answer at 21.)

arguably excessive, duplicative, or nonproductive." Id. at 23; citing Means Aff. at paras. 2-3 and Ex. 1; Means Supp. Aff. at para 3.

[1] For the reasons set forth below, we reject OSM's arguments in this case. As set forth in 43 CFR 4.1294(b), appropriate costs and expenses, including attorney fees, may be awarded

> [f]rom OSM to any person, other than a permittee or his representative, who initiates or participates in any proceeding under the Act, and who prevails in whole or in part, achieving at least some degree of success on the merits, upon a finding that such person made a substantial contribution to a full and fair determination of the issues.

Under 43 CFR 4.1295, the award may include all costs and expenses, including attorney fees, reasonably incurred as a result of initiating or participating in a proceeding under the Act, as well as those reasonably incurred in seeking the award.

[2] Several definitions in SMCRA are pertinent to our analysis, and we construe them in harmony. The Act defines "permittee" as "a person holding a permit." It defines "person" as "an individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization." 30 U.S.C. § 1291(18), (19) (2000). The Act clearly distinguishes between a "person" and a "permittee" for purposes of awarding costs and expenses; a person may be a permittee, and vice versa. However, for our purposes, the definition of "person" who may properly qualify for costs, expenses, and attorney fees under 30 U.S.C. § 1275(e) includes all non-permittees. See 30 U.S.C § 1291(19) (2000). Accordingly, a non-permittee seeking reversal of an AVS link applied as a result of an alleged offending relationship with a violator coal company is a person who may properly petition for an award of costs and expenses including attorney fees under 43 CFR 4.1294(b). 9/

We conclude that Peyton clearly meets the definition of "person" under the Act, and as such is not excluded from the ambit of 43 CFR 4.1294(b), since he was neither a permittee nor a representative of a permittee. There is no evidence that he was a permittee and OSM does not so claim. Rather, OSM claims that Peyton is a "representative" of a permittee, an argument disputed in Peyton's affidavit as unchallenged in the record concerning his specific actions and duties as an "outside

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9/ We determined in Skyline Coal Co. v. OSM, 150 IBLA 51, 55 (1999), that § 525(e) of SMCRA clearly does not limit an award of costs and expenses, including attorney fees, to citizens not involved in the regulated industry, as claimed by OSM.

director."10/ We agree with Peyton that his limited role as an "outside director," with no authority to direct the management of Slab Fork, does not result, in and of itself, in "representative" status which would disqualify him from receiving an award of costs and expenses. Control of Slab Fork rested with members of the Caperton family, who were Slab Fork's officers and who conducted the company's business. This reality, when viewed against the fact that the alleged violations to which OSM erroneously linked Peyton occurred after his resignation from the company in 1983, clearly underscores the erroneous nature, as Judge Torbett found, of OSM's insistence on maintaining Peyton on its AVS list, and then so ardently arguing that Peyton was not entitled to reasonable costs and expenses, including attorney fees. There is simply no merit to OSM's position that Peyton is not within the category of "person" under the Act, and as such is excluded from the ambit of 43 CFR 4.1294(b), in that there is no evidence that he was also a permittee or the representative of a permittee. OSM's determination to the contrary does not withstand analysis of the facts, nor of the Act and its implementing regulatory provisions.

We agree with Peyton's analysis of his past relationship with Slab Fork in the context of SMCRA and implementing regulations, as presented by counsel for Peyton:

> Because the only persons the regulation excludes from eligibility for a cost-award are "a permittee or his representative," OSM contends * * * that "Peyton is a 'representative of a permittee.'" OSM's sole basis for this claim is that Peyton had been an outside director of Slab Fork Coal Company (itself a permittee at the time) until 1983 and that it was this past association with Slab Fork which was the basis for the listing on the AVS which Peyton had challenged as erroneous in the administrative proceeding in question.
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> * * * * * * *
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> There is no evidence that Peyton was ever Slab Fork's representative. Indeed, that was at the heart of the underlying proceeding, in which Peyton proved he did not own or control Slab Fork, or have anything to do with the way it conducted its mining operations. He was merely one member of a 12-member board of

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10/ Black's Law Dictionary 32 (7th ed. 1999) defines "outside director" as "a nonemployee director with little or no direct interest in the corporation. See also 18B Am. Jur. Corporations § 1348 (1985), which defines "outside director" as one who is neither an officer nor an employee of the corporation"; but "the definition [of 'outside director'] does not * * * include legal counsel, the corporation's banker, retired executives of the corporation, and representatives of major corporate suppliers or customers."

> directors of a company that was closely-held by a family group of which he was not a part, with no authority to represent the company. See, e.g., Peyton's letter; and Supp. Affidavit.
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> Nor did Peyton bring his appeal of OSM's March 1993 decision to the Office of Hearings and Appeals as a representative of Slab Fork. Peyton sought to advance no interest or objective of Slab Fork's, but rather his own interest as a lawyer, former public servant, and businessman who sought to correct the mistaken information in the AVS that had embarrassed him and damaged his reputation. See Peyton's letter. Moreover, even though it was his ancient association with Slab Fork that was OSM's basis for listing him on the AVS, he had (as OSM did not dispute) severed that relationship 10 years earlier. Not only had Peyton long ago terminated that association, but Slab Fork had apparently gone out of business in the meantime, and could have had no interest whatsoever in Peyton's action. Thus, in seeking to embrace Peyton within the scope of the term "representative" of a permittee, it is OSM, not Peyton, that seeks to stretch the language of the law.

(Answer at 10-11 (emphasis in original).) In fact, as discussed infra, OSM conceded that Peyton had no role in corporate decisionmaking and did not own or control the corporation in any way, and that Peyton was erroneously listed on AVS. There is simply no evidence in the record to support OSM's claim that Peyton was the representative of a permittee and thus stood in the shoes of the permittee. To accept OSM's argument would virtually eliminate the possibility that a coal company could ever have outside directors who were not so closely tied to corporate decisionmaking that they would be considered in any category other than a permittee or the permittee's representative under the Act. The definition of person subject to an award of costs and expenses, and our decision in Skyline, supra, clearly believe that argument.

OSM is correct in its assertion that in SMCRA Congress intended to differentiate between private citizens and coal operators. But its conclusion that persons such as Peyton associated with coal companies can recover fees and expenses only if they prove bad faith is not supported by the legislative history of section 525(e), as discussed supra, and is not supportable in view of the fact that a coal company official may be a "person" as that term is used in § 4.1294(b). We thus find no support for OSM's argument that 43 CFR 4.1294(b) is reserved for private citizens not associated with the industry and that coal operators and persons associated with coal operators, such as Peyton, must present claims for awards exclusively under 43 CFR 4.1294(c). In accord, Skyline Coal Co. v. OSM, supra. For this reason, we

find that 43 CFR 4.1294(b) is the applicable regulation for Peyton's petition for an award of costs and expenses including attorney fees in this case.

We reject OSM's claim that the litigation here was unnecessary or that Peyton did not prevail. The appeal of the March 10, 1993, OSM decision was initiated by Peyton, and he participated in all stages of the proceedings, finally achieving full success on the merits. Because he was the sole party challenging OSM's decision, his contribution to Judge Torbett's decision cannot be said to be insubstantial. See National Wildlife Federation, 152 IBLA 352, 359 (2000); Kentucky Resources Council v. OSM (On Judicial Remand), 151 IBLA 324, 331 (2000); Save Our Cumberland Mountains, Inc., 111 IBLA 197 (1989). We similarly find that all the arguments in Peyton's Motion for Summary Decision were related to the sole claim which he raised and on which he prevailed before Judge Torbett. Further, as we noted above, although the record reflects that Peyton cooperated fully with OSM in attempting to resolve the underlying case, OSM inaction, despite conceding in writing that no link existed and Peyton was improperly listed in their AVS file, forced him to request that Judge Torbett rule on the Motion for Summary Decision.

We therefore find that OSM's claim that the litigation was unnecessary is, to use counsel for Peyton's term, disingenuous. (Answer of Appellee Angus E. Peyton at 11.) As counsel for Peyton correctly states, OSM admitted that listing Peyton on its AVS file was mistaken. OSM's initial action in listing him on its AVS files, and OSM's subsequent inaction in failing to delist him from its AVS files, having conceded that the initial listing was in error, resulted in his reasonable conclusion that it was necessary for him to challenge OSM's handling of the matter. Counsel for Peyton accurately presents the facts which inevitably demonstrate that Peyton's appeal was not only necessary, but successful:

> Indeed, rather than being unsuccessful, the litigation--including specifically the motion for summary decision--obviously persuaded OSM either that it had misjudged Peyton's case or that it could not sustain its decision on the record before Judge Torbett. After briefing on the motion for summary decision, OSM's attorney asked Judge Torbett on September 13, 1993 to hold off ruling on the motion until OSM had had an opportunity to take Peyton's deposition, and Judge Torbett agreed. See November 23, 1993 and July 6, 1994 Letters from Thomas C. Means to Judge Torbett (Attachs. A and B hereto).
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> That deposition was taken on October 13, 1993. When no further action was forthcoming from OSM, counsel for Peyton wrote to Judge Torbett and urged him to act on the pending motoin. Attach. A. On March 1, 1994, Judge Torbett wrote to counsel for both parties, noting that he understood that Peyton's deposition had been taken and

> that he recalled being told that "dependent on the outcome of the deposition," "the Department was going to take a position as to whether this case needed a hearing or could be decided on the basis of the record." Attach. C.
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> Counsel for OSM responded by letter to the Judge on March 23, 1994 that the deposition had "satisfied [OSM]" that Peyton did not control Slab Fork, and that OSM "intends to draft a revised agency decision reflecting this determination and, correspondingly, amend the [AVS] files to reflect the same. Upon receipt of the revised agency decision, presumably Peyton would move to dismiss the present proceedings." Attach. D. Yet, no revised agency decision or other action from OSM ever followed. * * *

(Brief of Appellee at 15-16.) After a year, with no further action by OSM, Judge Torbett granted Peyton's motion for summary decision, reversed OSM's March 10, 1993, decision, and dismissed the case.

Even conceding that Peyton prevailed on the merits, OSM would deny his petition on the basis that he does not adequately substantiate and document the requested costs and expenses, including attorney fees, pursuant to 43 CFR 4.1294(b). OSM contends, in addition, that the use of Washington, D.C., attorney rates by Judge Torbett is incorrect and that the award must be reduced accordingly to reflect the hourly rates applicable to Charleston, West Virginia. OSM notes that Slab Fork's operations were in Charleston and that Peyton is located in Charleston, and thus, it argues, representation should only be reimbursed at the Charleston rate.

[3] We first examine OSM's challenge to the adequacy of the documentation filed for Peyton's attorneys. We must agree with Judge Torbett that the schedule of attorneys' hours and itemization submitted by Peyton's attorneys in the petition, the Means' affidavit attached thereto, and the Means' Supplemental Affidavit of August 7, 1997, were adequate for a determination of an award of attorney fees. A good faith petition for costs and expenses, including attorney fees, is one which excludes excessive, redundant or unnecessary hours, and the trier of fact has the discretion to make those determinations to arrive at a reasonable fee. The determination of an Administrative Law Judge to grant a petition for costs and expenses, including attorney fees, will not be disturbed on appeal absent a showing of error or abuse of discretion. See Skyline Coal Co. v. OSM, supra at 59. Upon consideration of Means' two affidavits and his explanation therein of his efforts to ensure that billing hours were carefully limited to "productive" efforts on Peyton's behalf, and after review of the monthly bills submitted to Peyton, we are satisfied that Peyton's petition excludes

excessive, redundant, or unnecessary hours. See Hensley v. Eckerhart, 461 U.S. 424, 433, 434, 437 n.12 (1983); Skyline Coal Co. v. OSM, supra. 11/

We note that a person seeking attorney fees is not required to record in great detail how each minute of time was expended, but the general subject of the time expenditures should be identified. Id., citing Utah International, Inc. v. Dep't of the Interior, supra at 826 n.31. In the instant case, each of the activities performed on behalf of Peyton was listed by his counsel along with the date of the activity. We are satisfied by the assertions in the Means affidavits that the submitted records accurately reflect the actual records from which they were taken. As we stated in NRDC, supra at 374 n.21, "[t]his is sufficient to constitute 'evidence concerning the hours expended on the case, as required by 43 C.F.R. § 4.1292(a)(3)'." Citing Copeland v. Marshall, supra at 905. We note that the Circuit Court in Ramos v. Lamm, 713 F.2d 546, 553 (10th Cir. 1983), concluded that contemporaneous time records must be submitted to a district court only "upon request." The Department of the Interior has likewise imposed no such requirement nor made any such request in 43 CFR 4.1292(a)(3). Moreover, this Board stated in NRDC, supra at 374 n.21, "petitioners were not required to submit evidence regarding all the hours expended on the case."

We also note that OSM has not provided one instance where it finds a specific notation within the billing of Peyton's attorneys to represent an unacceptable or even suspect charge. We thus find that the documentation suffices to support the requested award and that it compares favorably with documentation found qualifying in Skyline Coal Co v. OSM, supra, and in Gateway Coal Co. v. OSM, 131 IBLA 212 (1994).

OSM's second challenge to the computation of fees relates to the use of Washington hourly rates, rather than Charleston, West Virginia, rates. OSM does not, however, challenge the reasonableness of the rates charged by Peyton's attorneys, per se, as accepted Washington rates, nor does it challenge any of the attorneys' specific hourly billing rates as unjustified for Washington attorneys based upon their expertise and experience. The two Means' affidavits, unrebutted, establish that the rates for the three partners and one associate involved in this litigation were the rates at the time the work was performed that the firm charged all clients for

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11/ In his August 7, 1997, sworn affidavit, Means further explains:
"I have reviewed the computer generated entries and work summaries associated with the work performed by Crowell and Moring in this case and, to eliminate any potential areas of dispute, I have 'written off' any time that I felt was arguably excessive, duplicative or nonproductive." As a result of this process, Mr. Peyton was not billed for this work, although the time was actually worked.

whom they performed services. For this reason, we will examine only the issue of the selection of Washington, rather than Charleston, representation, and whether reimbursement at the higher Washington rate 12/ can be justified in this case in establishing the "lodestar" amount. 13/

In NRDC, supra at 393, we noted that the Supreme Court has stated that the reasonable hourly rate will normally be considered that rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation," as demonstrated by satisfactory evidence. Quoting Blum v. Stenson, 465 U.S. 886, 896 n.11 (1984); see also Copeland v. Marshall, 641 F.2d at 892. Concluding that the community market rate rule is the proper approach for the present case, we next determine what is the relevant community for purposes of determining the reasonable hourly rate.

Peyton claims that Washington, D.C., rates are applicable for all attorney hours and other expenses for all aspects of these proceedings. OSM contends otherwise, claiming that Charleston, West Virginia, is the "relevant community" because that is "where Peyton and the relevant mining operation were located." See SOR at 17. We carefully addressed this issue in NRDC, supra at 396-99, wherein we noted that hourly rates relied on in Utah International, supra at 830 n.38, were the prevailing rates in the community where "the judicial proceedings were located." NRDC, supra at 397. In Ramos v. Lamm, supra at 555, the court similarly concluded
that, absent unusual circumstances, the hourly rates will be determined "based upon the norm for comparable private firm lawyers in the area in which the court sits." In

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12/..We note, however, as pointed out by Peyton in his Answer, the firm he retained has been involved in many of the most significant cases litigated regarding the AVS process (see note 4, supra) and are recognized by this Board as possessing significant expertise in the SMCRA area. We note that the fees charged by the law partners in this litigation, each of whose resume supports a finding of great experience in this area, is entirely consistent with the fees, adjusted for time, approved by the Board for the Washington firm members involved in NRDC, supra, cited by Peyton. We are likewise satisfied from the attachments to the Means' Affidavit and Supplemental Affidavit that the hourly fees charged by the firm for the services of these participating partners are the customary fees that are charged by the firm for all such clients.

13/ The "lodestar" amount, or that portion of an award represented by attorney fees, is determined by taking the number of hours reasonably expended on qualifying work on behalf of Peyton by his attorneys multiplied by their reasonable hourly rate. A strong presumption exists that the "lodestar" amount represents the reasonable fee to which counsel is entitled. Blum v. Stenson, 465 U.S. at 897; Utah International, supra at 828; NRDC, supra at 373.

this case, however, the hearing, even if it were to be held in Charleston, West Virginia, was foreclosed by Judge Torbett's ruling on the Motion for Summary Decision. Thus, all attorney activities on behalf of Peyton concerning the merits of the underlying case occurred in Washington, D.C. Moreover, all further proceedings concerning the attorney fee issues are before this Board, with situs in Arlington, Virginia, where Washington, D.C., rates would be applicable. See National Wildlife Federation, supra at 362-64.

Peyton makes a further and more compelling argument in justification of the use of rates other than those prevailing where the proceedings would normally take place. He urges, just as petitioner successfully argued in NRDC, supra, that the complexity of the issues related to ownership and control in section 510(c) of SMCRA and its implementing regulations required counsel with specialized expertise. The courts have approved the use of hourly rates for counsel from outside the local area in such circumstances. See Chrapliwy v. Uniroyal, Inc., 670 F.2d 760, 769 (7th Cir. 1982), cert. denied, 461 U.S. 956 (1983), and Maciera v. Pagan, 698 F.2d 38, 40 (1st Cir. 1983), in support of that argument.

The complexity of the regulations involving "ownership and control" of mining operations is reflected in the number of challenges to OSM's decisions that have come before this Board and in the courts. Moreover, as pointed out by Peyton in his Answer, during the merits phase of this litigation, there was added uncertainty, and hence the need for highly expert counsel, because litigation challenging the validity of OSM's regulations defining "ownership and control" had been pending in the U.S. District Court for the District of Columbia on fully briefed cross-motions for summary judgment since June 1990, with no resolution in sight. (Answer at 19.) While these regulations were upheld by the District Court after Peyton's Motion for Summary Decision was granted by Judge Torbett, we further note that the D.C. Circuit Court subsequently reversed and invalidated the regulations in National Mining Association v. U.S. Dep't of the Interior, 105 F.3d 691 (1997). The Office of Hearings and Appeals' experience in interpreting these regulations reflects the same complexity. See, e.g., James Spur, Inc. v. OSM, IBLA No. 96-633 (ALJ Torbett July 23, 1993, aff'd as modified, 133 IBLA 123 (1995), OSM's motion for stay denied, No. D 95-184 (Oct. 25, 1995), aff'd by Director, OHA, 12 OHA 133 (1996), overruled as precedent, Solicitor's M-Opinion (Dec. 5, 1996); see also 62 FR 19450-61 (April 21, 1997) (summarily repromulgating, as "interim rules," regulations that the D.C. Circuit had invalidated).14/ It is with this brief background that we must concur with Peyton that

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14/ The "interim rules" were the subject of further litigation which focused on OSM's determination to repromulgate the same rules as "interim" without public notice or opportunity for public comment. In National Mining Association v. U.S. Dep't of the Interior, 177 F. 3d 1 (D.C. Cir. 1999), the D.C. Circuit upheld certain of the interim

(continued.....)

the regulatory structure which framed the issues in his underlying case is extremely complex and we find, as we did in NRDC, supra, that seeking counsel from Washington, D.C. with the expertise reflected in the Peyton's attorneys' resumes submitted to this Board, was justified. We therefore approve the Washington, D.C., rate structure representing the normal billing rates for the four attorneys who worked on this case for Peyton.

OSM has raised no specific objection to billing for ministerial and mechanical tasks, and our careful review of these submissions reflects reasonable charges in each instance for a case involving complex and voluminous documentation.

To the extent not specifically addressed herein, OSM's arguments have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Torbett's August 11, 1997, order awarding Peyton $38,159.50 is affirmed.

_____
James F. Roberts
Administrative Judge

I concur:

_____
Bruce R. Harris
Deputy Chief Administrative Judge

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14/ (.....continued)
rules but, e.g., reversed the Department in holding that permit blocking based on entities formerly owned or controlled by an applicant was improper, in determining that a rebuttable presumption of ownership or control was invalid to the extent it was based on a person's status as officer or director or minority owner, and in determining that the rule permitting remedial action against operators holding state permits was invalid. Relevant to Peyton's status as "outside director," the Court characterized the presumption as "irrational," stating that "[b]eing an officer or director does not by itself enable an entity to control the company or its operations," as the regulation presumes. Id. at 6.